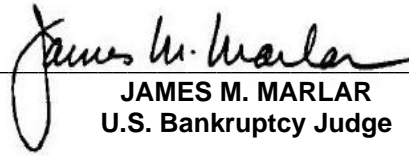


SIGNED.



Dated: May 05, 2009

  
JAMES M. MARLAR  
U.S. Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA**

In re: ) Chapter 13  
DAVID JOHNSTON and LYNDIA )  
JOHNSTON, ) No. 4:05-bk-04340-JMM  
Debtors. ) **MEMORANDUM DECISION**

Before the court is the Chapter 13 Trustee's motion to dismiss (DN 53). The Debtors have made no payments to the Trustee, for payment to their creditors, since early 2008.

The Debtors have proposed a wage assignment to their new employer, which they hope will give stability to their budget, on a going-forward basis, and in turn save their plan, so that they may eventually complete their plan and obtain a discharge. The Trustee and one creditor oppose further extensions and urge dismissal.

**BACKGROUND**

The Debtors filed for Chapter 13 relief on August 4, 2005. Their Chapter 13 repayment plan can be summarized as follows:

- Term: 45 months
- Monthly amount: \$150 per month
- Over 45 months = \$6,750

1 From these payments to the Trustee, the follow deductions occur:

2	Total to be paid:	\$6,750.00
3	Less: Trustee fee (10%)	(675.00)
4	Less: Balance due on attorneys fee	(2,144.00)
5	Less: Priority taxes (ADOR)	<u>(1,203.47)</u>
6	Balance to be distributed to creditors:	\$2,727.53

7 (Confirmation order, DN 37.) The Debtors' total unsecured claims are \$173,043.66, of which  
8 \$133,293.47 have filed claims. Of those creditors, the Arizona Department of Revenue asserts a  
9 priority tax claim of \$1,203.47. Payment of that claim comes ahead of unsecured creditors. Thus,  
10 the unsecured creditors will share, pro rata, \$2,727.53.<sup>1</sup> This equals about a 2% dividend on their  
11 respective claims.

12 A review of the Debtors' schedules reflects that, based on what the Debtors own as  
13 of the date of filing, their personal property (they own no real property) has no realizable value or  
14 is exempt. Thus, on liquidation, the creditors would realize nothing.

### 15 16 CONFIRMATION AND DEFAULTS

17  
18 After several false starts, the Debtors were able to obtain confirmation of their plan  
19 on April 19, 2007 (DN 37). In that confirmed plan, the ADOR's priority tax claims were liquidated  
20 at \$1,203.47, and the attorney's fees were approved at \$2,144.00.

21 The duration of the plan was extended from 36 to 45 months (DN 37). Approved  
22 claims totaled \$125,179.87 (DN 39).

23 On June 25, 2008, the Trustee moved for dismissal, noting a four-month payment  
24 delinquency of \$600 (DN 45). To remedy that breach, the Debtors asked for a retroactive four-  
25 month moratorium of their payments. (DN 48). No order was ever entered.

26  
27  
28 <sup>1</sup> The creditors opposing further extensions, Cira and Shawn Bowman, do not  
appear to have filed a claim. (*See* claims register.)

1           Moreover, in October, 2008, the Trustee objected, noting that even if the moratorium  
2 were to be granted, the Debtors had not resumed their payments to the Trustee the previous June or  
3 July, 2008, and continued to be in default.

4  
5                                   **CURRENT MOTION TO DISMISS**  
6

7           On March 27, 2009, the Trustee again sought dismissal of the Debtors' case, because  
8 their delinquencies had grown to \$1,350.00, which represented a nine-month default.

9           At the hearing on May 4, 2009, the Debtors appeared through counsel, who indicated  
10 that he might put through a wage assignment. However, no reasons were advanced for the  
11 continued defaults under the plan. Nor had the Debtors remedied the existing default, nor offered  
12 to cure it within a relatively short time frame.

13           In a few months, the Debtors will have benefitted from five years of protection from  
14 creditor activity. The 45-month period of their approved plan ended on May 4, 2009. Their  
15 moratorium was never granted. Thus, the time to have concluded the plan was May 4, 2009. Since  
16 they have not completed it, and are in severe default, this court feels that the case should be  
17 dismissed.

18           The Debtors have had every benefit of the bankruptcy code, yet choose to ignore the  
19 very minimal requirements imposed on them, i.e., the payment of \$150.00 each month. Had they  
20 done so, they would be getting a discharge this month, for only a 2% payment to creditors. Instead,  
21 this case is being dismissed and all of their unpaid creditors will once again be able to pursue them.  
22 This is the consequence for failing to follow the court's orders.

1 CONCLUSION

2

3 An order will be entered DISMISSING the Debtors' case.

4

5 DATED AND SIGNED ABOVE.

6

7 COPIES to be sent by the Bankruptcy Notification  
Center ("BNC") to the following:

8 Eric Ollason, Attorney for Debtors

9 Dianne C. Kerns, Chapter 13 Trustee

10 Michael J Vingelli

11 Vingelli & Errico

12 33 N Stone Suite 1800

13 Tucson, AZ 85701-1415

14 Office of the U.S. Trustee

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